

State of California

Department of Education

LAST MINUTE MEMORANDUM

DATE: July 6, 2004

TO: MEMBERS, STATE BOARD OF EDUCATION

FROM: Sue Stickel, Deputy Superintendent
Curriculum and Instruction Branch

RE: Item No. 22

SUBJECT: Special Education: Adopt Title 5 Regulations (Sections 3088.1 and 3088.2) regarding withholding funds to enforce special education compliance

A public hearing was held July 6, 2004, as required by the Administrative Procedure Act. No verbal comments were received. Four written comments were received from the public during the 45-day public comment period concerning proposed regulations 3088.1 & 3088.2. The final statement of reasons containing written responses to the public comments received is attached.

As a result of the public comments received, two changes are being recommended to the proposed regulations. The amended regulations are also attached.

The California Department of Education recommends that the State Board of Education

- (1) Approve the proposed amendments to the draft regulations;
- (2) Direct that the proposed amendments be circulated for a 15-day public comment period in accordance with the Administrative Procedure Act;
- (3) If no public comments are received during the 15-day period, complete the rulemaking package and submit the amended regulations to the Office of Administrative Law for approval;
- (4) If public comments are received during the 15-day period, place the amended regulations on the State Board's September 2004 agenda for action following consideration of the comments received.

[Attachment 1](#): Final Statement of Reasons (3 Pages)

[Attachment 2](#): Proposed Title 5 Regulations, sections 3088.1 and 3088.2 (3 Pages)

FINAL STATEMENT OF REASONS

UPDATE OF INITIAL STATEMENT OF REASONS

Regulation Sections 3088.1 and 3088.2

The proposed regulations are developed in response to the US Department of Education Office of Special Education Policy (OSEP) expectation that state education agencies have a full continuum of enforcement options to compel compliance with special education laws.

Section 3088.1 of the regulations specifies the required contents of a hearing notice and timelines for conducting the hearing prior to making a decision whether to withhold funds. Section 3088.2 specifies funds shall be withheld if the hearing officer determines that a preponderance of the evidence supports the Department's findings of noncompliance and withholding of funds is appropriate in the particular circumstance. The section also stipulates that the superintendent may apportion state and federal funds previously withheld from the local education agency when it is determined that substantial progress toward compliance with special education laws has been made.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF MAY 21, 2004 TO JULY 6, 2004.

Comment: Kevin Reed, General Counsel for the Los Angeles Unified School District, and Ronald Wenkart, General Counsel for the Orange County Office of Education, each submitted separate comments and legal arguments concerning the definition of "substantial noncompliance." Found in Section 3088.1(a). They propose that "substantial noncompliance" be defined using language derived in case law from Amanda J. v. Clark County School District, 267 F. 3rd 877 (9th Cir. 2001). The court stated, "Substantial noncompliance means an incident of significant failure to provide a child with a disability with a free appropriate public education or an act which results in the loss of an educational opportunity to the child or interferes with the opportunity of the parents or guardians of the pupil to participate in the formulation of the individual education program."

Response: As described above, these comments are persuasive and the regulation Section 3088.1 shall be amended to add the following language to define substantial noncompliance "an act which results in the loss of an educational opportunity to the child or interferes with the opportunity of the parents or guardians of the pupil to participate in the formulation of the individual education program."

Comment: Kevin Reed, General Counsel for the Los Angeles Unified School District, and Ronald Wenkart, General Counsel for the Orange County Office of Education, each submitted separate comments concerning Section 3088.1(f). Mr. Wenkart proposed the language of this section be amended to "Technical rules of evidence should not

apply to the hearing, but relevant written evidence or oral testimony may be admitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. A decision of the hearing officer to withhold funding shall be supported by substantial evidence produced at the hearing showing that the local education agency was in substantial noncompliance with a provision of law regarding special education and related services or a corrective action order by the Department of Education that complies with laws regarding special education and related services. No decision to withhold funds shall be based solely upon hearsay evidence. All findings of the hearing officer shall be based solely on the evidence presented at the hearing.” Mr. Reed states that “it is essential that the regulations reflect that the evidentiary standard used at a hearing be clearly based on evidence and not hearsay.”

Response: Some of the proposed language for section 3088.1 (f) is found in Education Code Section 48918 (h) regarding the technical rules of evidence. It is agreed that a decision to withhold funds should not be based solely upon hearsay evidence. Section 3088.1(f) shall be amended to read, “Technical rules of evidence should not apply to the hearing, but relevant written evidence or oral testimony may be submitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. A decision of the hearing officer to withhold funding shall not be based solely on hearsay evidence but must be supported by evidence produced at the hearing showing substantial noncompliance with the provisions of special education law. Local education agencies may be represented by counsel and the hearings will be open to the public.”

Comment: Kevin Reed, General Counsel for the Los Angeles Unified School District, comments “the need to note exceptions to a Local Education Agency (LEA) completing corrective action within the timeline stipulated by the CDE.” He further notes that currently the Focused Monitoring Technical Assistance (FMTA) Unit within the CDE informally allows for brief extensions beyond the typical timeline.

Response: In addition to the FMTA unit being able to informally grant extensions beyond the typical timeline, Section 3088.1(d) contains the provision that the hearing officer may grant extensions for good cause. This provides adequate protection to all parties in the event that exceptional circumstances cause delays and prevent timely completion of correction actions.

Comment: Kevin Reed, General Counsel for the Los Angeles Unified School District, comments that substantial progress toward compliance with the law needs to be objectively defined and that the permissive nature of the regulations with regard to restoring funds has the potential to further damage the ability of the LEA to carry out its responsibilities. Carol Bartz, Senior Director of the North Inland Special Education Region also comments that the language in Section 3088.2(b) should be changed from “may” to “shall” with regard to the superintendent being mandated to apportion previously withheld funds.

Response: With respect to the permissive language contained in regulation Section 3088.2 (b) this reflects the language found in Education Code Section 56845 (b). Given the scope of the hearing and the expertise of the hearing officer, it is expected that the hearings will be factually and legally complex. When a finding of substantial noncompliance is made, the hearing officer shall include information about the steps that the local educational agency (LEA) can take to remedy that finding. It therefore seems appropriate to allow the hearing officer to define “substantial progress” based on the specific circumstances raised during the hearing rather than attempt to include a generic definition in the regulations.

Comment: Carol Bartz, Senior Director of the North Inland Special Education Region also comments that the language in Section 3088.1 (d) which states “the hearing officer should have experience in special education and administrative hearing procedures” could be interpreted that the hearing officer could only be someone from McGeorge School of Law Special Education Hearing Office.”

Response: This language is to assure that the hearing officer is qualified and knowledgeable to conduct special education hearings and not to limit selection of hearing officers to one source. There are hearing officers who meet these criteria that are not from McGeorge School of Law Special Education Hearing Office.

Comment: Jeff Thom, president of the California Council of the Blind commented that the council is extremely supportive of these proposed regulations.

Response: The Department of Education is pleased to hear of the support of these regulations from the California Council of the Blind.

ALTERNATIVES DETERMINATION

The State Board has determined that no alternative would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Title 5. EDUCATION

Division 1. State Department of Education

Chapter 3. Handicapped Children

Subchapter 1. Special Education

Article 7. Procedural Safeguards

Add §§ 3088.1 and 3088.2 to read:

§ 3088.1. Sanctions: Withholding Funds to Enforce Special Education Compliance.

(a) When a district, special education local plan area, or county office of education fails to comply substantially with a provision of law regarding special education and related services, the superintendent may withhold funds allocated to such local agency under Chapter 7.2 (commencing with Section 56836) of Part 30 of the Education Code and the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.). Such noncompliance may result from failure of the local agency to substantially comply with corrective action orders issued by the Department of Education in monitoring findings or complaint investigation reports. "Substantial noncompliance" means an incident of significant failure to provide a child with a disability with a free appropriate public education, **an act which results in the loss of an educational opportunity to the child or interferes with the opportunity of the parents or guardians of the pupil to participate in the formulation of the individual education program**, a history of chronic noncompliance in a particular area, or a systemic agency-wide problem of noncompliance.

(b) Prior to withholding funds, the department shall provide written notice to the local educational agency, by certified mail, of the noncompliance findings that are the basis of the Department's intent to withhold funds. The notice shall also inform the local agency of the opportunity to request a hearing to contest the findings and the proposed withholding of funds.

(c) The notice shall include the following information:

1 (1) The specific past and existing noncompliance that is the basis of the withholding of
2 funds.

3 (2) The efforts that have been made by the Department to verify that all required corrective
4 actions have been taken.

5 (3) The specific actions that must be taken by the local educational agency to bring it into
6 compliance by an exact date to avoid the withholding of funds.

7 (d) The local educational agency shall have 30 calendar days from the date of the notice to
8 make a written request for a hearing. The department shall schedule a hearing within 30 days of
9 receipt of a request for hearing, and notify the local agency of the time and place for hearing. A
10 hearing officer with experience in special education and with administrative hearing procedures
11 shall be assigned by the department to conduct the hearing and make an audio recording of the
12 proceeding. The hearing officer may grant continuances of the date for hearing for good cause.

13 (e) The local education agency shall have the opportunity, prior to the hearing, to obtain all
14 documentary evidence maintained by the Department's Special Education Division that
15 supports the findings of noncompliance at issue in the notice of intent to withhold funds.

16 (f) Technical rules of evidence shall not apply to the hearing, but relevant written evidence or
17 oral testimony may be submitted, ~~as appropriate~~ and given probative effect only if it is the
18 kind of evidence upon which reasonable persons are accustomed to rely in the conduct
19 of serious affairs. A decision of the hearing officer to withhold funding shall not be based
20 solely on hearsay evidence but must be supported by evidence produced at the hearing
21 showing substantial noncompliance with the provisions of special education law. Local
22 education agencies may be represented by counsel and the hearings will be open to the public.

23 (g) If a hearing is not requested, the Department shall withhold funds as stated in the notice.
24 If a hearing is held, a written decision shall be rendered within 30 calendar days from the date
25 the hearing is held.

1 NOTE: Authority cited: Section 33031, Education Code. Reference: Section 56845(a),
2 Education Code.

3 **§ 3088.2. Enforcement and Withholding of Funds.**

4 (a) The hearing officer shall determine, based on the totality of the evidence, whether a
5 preponderance of the evidence supports the Department's findings of noncompliance and the
6 determination that withholding of funds is appropriate in the particular circumstances of the
7 case. The hearing officer's decision shall be the final decision of the Department of Education.

8 (b) If the Superintendent of Public Instruction determines, subsequent to withholding funds,
9 that a local educational agency has made substantial progress toward compliance with the state
10 law, federal law, or regulations governing the provision of special education and related services
11 to individuals with exceptional needs, the superintendent may apportion the state or federal
12 funds previously withheld to the local educational agency.

13 NOTE: Authority cited: Section 33031, Education Code. Reference: Section 56845(b),
14 Education Code.

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